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No. 93-1573

In the Supreme Court of the United States

OCTOBER TERM, 1993

RONALD E. CHAMNESS AND RHEA ANN CHAMNESS,
PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION AS
RECEIVER FOR MBANK DALLAS, N.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a court of appeals can affirm a grant of summary judgment by relying on one of the several alternative legal theories on which the district court relied in granting summary judgment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is unpublished, but the judgment is noted at 9 F.3d 1546 (Table). The opinions of the district court (Pet. App. D1-D14; App., *infra*, 1a-9a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1993. A petition for rehearing was denied on January 4, 1994. Pet. App. B1-B2. The petition for a writ of certiorari was filed on April 4, 1994.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1979, while living in a house located at 6550 Cliffbrook in Dallas, Texas, petitioner Ronald E. Chamness and his late wife Marlene Chamness purchased a house located at 4208 Armstrong Parkway in Highland Park, Texas.[1] In 1980, while living in the Cliffbrook home, Chamness[2] obtained a $1 million loan to renovate the Armstrong property, secured by a deed of trust encumbering that property. To obtain the loan, he executed an affidavit stating that the Armstrong property "does not constitute any part of [Chamness's] business or urban homestead, and the [Armstrong property] is not claimed or designated by him as homestead property." By the end of 1981 Chamness had obtained two additional loans from Republic National Bank to renovate the Armstrong property, for $1.5 million and for $937,500; petitioner executed similar affidavits in connection with those loans. At about the same time, Chamness sold the Cliffbrook home and began claiming his Cedar Creek house in Henderson County, Texas as his homestead. Pet. App. A2-A3, C3-C4, D3-D4.

In June of 1983 Chamness renewed and extended the sums he owed on the Republic promissory notes by

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[1] Our statement of the facts is drawn from the opinion of the court of appeals, which apparently relied on the materials submitted in support of the FDIC's motion for partial summary judgment (Pet. App. C1-C10), to which petitioners did not respond in the district court.

[2] References to Chamness are to Ronald E. Chamness individually.

executing a note payable to First City Bank of Dallas in the amount of $2,550,000. In the deed of trust securing his obligation to repay that note, Chamness again represented that the Armstrong Property was not and had not constituted his homestead; he also executed another non-homestead affidavit. In March of 1984, Chamness executed another deed of trust encumbering the Armstrong property, in which he again expressly renounced any homestead claim to that property. Pet. App. A3, D4.

In March of 1985, the note and deed of trust were assigned from First City to MBank Dallas, N.A. After Chamness defaulted on the promissory note, William Trione (the trustee under the deed of trust), foreclosed on the Armstrong Property. Oregon, Inc. purchased the property at the foreclosure sale and subsequently conveyed title to Linda Wikert. Pet. App. A3.

2. In 1988, petitioners (Chamness and his late wife), together with several other relatives who could have had an interest in the Armstrong property if it had been Chamness's homestead, filed suit in a Texas court against MBank, Oregon, Inc., Trione, and Wikert, claiming that Chamness still owned the property and that the foreclosure was improper, based on the contention that the property had been his homestead. MBank filed a counterclaim against petitioner for fraud and for collection on the balances remaining unpaid on the note. Pet. App. A3-A4.

3. On March 28, 1989, the Comptroller of the Currency declared MBank insolvent and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver for MBank. Acting in that capacity, the FDIC intervened and removed the case to federal

district court. See Pet. App. A4, D3.[3] In December of 1989, the FDIC filed a motion seeking summary judgment on all of petitioners' claims. *Id.* at A4; see *id.* at C1-C10 (reprinting motion). The motion, supported by various affidavits, exhibits, and responses by petitioners to requests for admission, alleged that all of the documents in the records of the institution at the time it failed (which included the documents outlined above in which Chamness expressly disclaimed any homestead interest in the Armstrong property) indicated that petitioners had no homestead interest in the Armstrong property. *Id.* at C6-C7. The motion contended that the FDIC's submissions raised the question "[w]hether [petitioners] are entitled to assert home stead [*sic*] defenses to lien claims in spite of written representations that the property at issue was not homestead." *Id.* at C7. The brief supporting the motion argued that the question should be answered in the negative, based on this Court's decision in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and on 12 U.S.C. 1823(e) (Supp. IV 1992).

Petitioners did not respond to the motion or to document discovery requests made by the FDIC. When petitioners failed to comply with the discovery requests even after six extensions of time granted by the district court, the FDIC filed a motion for sanctions pursuant to Fed. R. Civ. P. 37. See Pet. App. A4. At that point, the district court issued an opinion granting summary judgment and sanctions

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[3] The Deposit Insurance Bridge Bank, subsequently known as Bank One, also became a party to the case because it acquired various assets and liabilities of MBank from the FDIC as receiver.

dismissing petitioners' claims. Pet. App. D1-D14. The court reasoned that the "applicable loan documents are facially valid," and "that *D'Oench, Duhme*, §1823(e) and other law overrides the homestead protection upon which [petitioners] base their claims." Pet. App. D12. On the question of sanctions, the court explained "that [petitioners] have repeatedly engaged in willful and bad faith conduct * * * in failing to produce documents responsive to the FDIC's [document request] in the time and manner as provided by the Federal Rules, and in direct contravention of the order entered herein by [a magistrate judge]." *Id.* at D13.

Petitioners filed a motion to reconsider, arguing that the district court had erred in relying on *D'Oench, Duhme* to bar their homestead claims and that dismissal was an excessive sanction for their misconduct. See App., *infra*, 3a. The district court denied that motion. *Id.* at 1a-9a.[4] The court explained that "[u]nder Texas law, someone who represents that certain property is not his homestead and he [*sic*] is not occupying the property when the representation is made, is estopped from later making a homestead claim as to that property." *Id.* at 4a. The court noted that the FDIC's summary judgment submission included "five documents that [Chamness] executed on four different dates * * * represent[ing] that the property in question is not his homestead," and that in several of the documents he stated under oath that he was not residing on the property. *Ibid.* Because

[4] Because the opinion of the district court rejecting the motion to reconsider is not appended to the petition, we reprint it as an appendix to this brief.

petitioners did not controvert the accuracy of those documents in response to the FDIC's motion for summary judgment, the court concluded that petitioners were "estopped as a matter of law from asserting their homestead claim." *Id.* at 4a-5a. After reviewing the misconduct on which it had relied to justify the sanction of dismissal, the court reaffirmed the finding that "dismissal of [petitioners'] claims was the appropriate sanction." *Id.* at 8a.

4. The court of appeals affirmed. Pet. App. A1-A7. The court first addressed the homestead issue. On that point, the court noted that, because petitioners "failed to respond to the summary judgment motion, despite repeated extensions of time[, the court] must assume as true the facts alleged by the [FDIC]." *Id.* at A6. Accepting those facts as true, the court agreed "with the district court that the homestead claims asserted by [petitioners] were barred under Texas homestead law, which provides that a claimant has no homestead protection if he represents that the property is not his homestead at a time when he is not actually occupying the property." *Ibid.* Accordingly, the court declined to consider whether the district court also was correct in holding that petitioners' claims should be dismissed under *D'Oench*, *Duhme* and Section 1823(e), Pet. App. A6, or as a sanction for discovery abuse, Pet. App. A7.

ARGUMENT

Petitioners do not challenge the accuracy of the Fifth Circuit's conclusions regarding Texas homestead law. Rather, they argue (Pet. 3-12) that the Fifth Circuit's disposition of the case based on undisputed principles of Texas law constituted an erro-

neous grant of summary judgment to the FDIC on a new legal theory to which petitioners did not have an adequate opportunity to respond. As is clear from the Statement above, that argument rests on an inaccurate description of the proceedings in the lower courts.

Contrary to petitioners' conclusory allegation (Pet. 2), the court of appeals did not rely on an "entirely new" legal theory as a basis for rejecting petitioners' attempt to disavow Ronald Chamness's sworn statements regarding the nature of his interest in the Armstrong property. The district court had concluded that the FDIC was entitled to summary judgment for three discrete reasons: (a) estoppel under Texas homestead law, see App., *infra*, 4a-5a; (b) the *D'Oench, Duhme* doctrine and 12 U.S.C. 1823(e) (Supp. IV 1992), see Pet. App. D10-D12; and (c) petitioners' discovery abuses, see Pet. App. D12-D14. The court of appeals appropriately disposed of the appeal by addressing a single ground that it found adequate to support the judgment of the district court.

Petitioners therefore err in suggesting (Pet. 11-12) that the court of appeals denied petitioners due process. As for the district court's decision to grant summary judgment on a ground not explicitly advanced by the FDIC, and to grant summary judgment to an additional party who did not seek summary judgment, this Court has recognized that it is proper for a district court to grant summary judgment *sua sponte* as long as the losing party has an adequate opportunity to present evidence to support its position. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 326 (1986). The FDIC's motion for summary

judgment gave adequate notice to petitioners that they needed to provide support for their homestead claims when it raised the question "[w]hether [petitioners] are entitled to assert home stead [*sic*] defenses to lien claims in spite of written representations that the property at issue was not homestead," Pet. App. C7. Petitioners' obdurate noncompliance with the discovery and summary judgment processes in the district court puts them in no position to complain about being given an inadequate opportunity to address the legal questions presented by the FDIC's defenses to their claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1994

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:89-CV-1117-P

RONALD E. CHAMNESS, RHEA ANN CHAMNESS, LISA C. CHAMNESS, RONALD E. CHAMNESS, JR., AND HOLLY A. CHAMNESS, Plaintiffs

v.

FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR MBANK DALLAS, N.A., DEPOSIT INSURANCE BRIDGE BANK, N.A., OREGON, INC., WILLIAM R. TRIONE, AND ALINDA HILL WIKERT, Defendants

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[Filed Apr. 29, 1993]

ORDER

On August 24, 1990, Judge Robert Porter signed a Memorandum Opinion and Order in which he ruled on the motions for summary judgment of Defendants Federal Deposit Insurance Corporation (FDIC), Deposit Insurance Bridge Bank, N.A., Oregon, Inc., and William R. Trione and motions for sanctions of these defendants and defendant Alinda Hill Wikert. Judge Porter held that the D'Oench-Duhme doctrine precluded the claim of homestead asserted by Plain-

tiffs in this case and granted summary judgment for all defendants except Alinda Hill Wikert. Judge Porter also granted all of the defendants' motion for sanctions and ordered that all of Plaintiffs' claims be dismissed with prejudice against all defendants. Judgment was not entered pending the judge's ruling on the issue of attorneys fees on which the parties were to submit affidavits. At the time of entry of the Memorandum Opinion and Order, judgment would have been partial because of one of the defendants had a counterclaim pending against plaintiff Ronald E. Chamness. That counterclaim has apparently now been discharged in bankruptcy. (see motion of Ronald E. and Rhea Ann Chamness to Dismiss their Claims against Defendants William Trione and Oregon, Inc).

On July 23, 1991, and prior to Judge Porter's ruling on attorneys fees, plaintiffs Ronald E. and Rhea Ann Chamness filed for bankruptcy. The bankruptcy stay was lifted on June 8, 1992. Subsequent to the lifting of the bankruptcy stay, plaintiffs Ronald and Rhea Ann Chamness filed a Motion to Reconsider and Vacate Judge Porter's Memorandum Opinion and Order of August 24, 1990 and a motion to dismiss their claims against defendants FDIC, Oregon, Inc. and William Trione. Plaintiffs Ronald E. Chamness, Jr., Holly A. Chamness, and Lisa C. Chamness filed motions to dismiss all of their claims as to all defendants. In response, the defendants filed motions opposing the motion to reconsider, opposing the dismissal of any of the plaintiffs' claims without prejudice, and motions to strike and objecting to late filed discovery responses of plaintiffs. The late filed discovery responses is [*sic*] an apparent attempt by plaintiffs to correct some of the conduct for which Judge Porter

imposed sanctions in his Memorandum Opinion and Order of August 24, 1990.

For reasons set forth below, the court denies plaintiffs Ronald E. and Rhea Ann Chamness' motion to reconsider and motion to dismiss defendants FDIC, Oregon Inc. and William Trione, and denies plaintiffs Ronald E. Chamness, Jr., Holly A. Chamness and Lisa C. Chamness' motions to dismiss their claims.

MOTION TO RECONSIDER

In their motion to reconsider, plaintiffs advance two main arguments. First, that the August 24, 1990, order is in error because it incorrectly applied the D'Oench-Duhme doctrine to preclude plaintiffs' homestead claim. Second, that dismissing the case as an imposition of sanctions was improper because there was no discussion in the order of the consideration of any lesser sanction and, a review of the record reveals that the extreme sanction of dismissal was inappropriate.

In support of their first argument, plaintiffs cite the case of *Patterson v. FDIC*, 918 F. 2d 540 (5th Cir. 1990) as an "identical case that was decided against the FDIC." In the *Patterson* case, the court held 12 U.S.C. § 1823(e) was not "so broad as to override the Texas Homestead Laws ... we hold that under the facts of this case, § 1823(e) does not preclude Patterson from attempting to prove her homestead under Texas law.", [*sic*] *Patterson*, at 545. Defendants counter that *Patterson* is inapposite because it involved 12 U.S.C. § 1823(e) and not the D'Oench-Duhme doctrine and cite the case of *Buchanan V. FSLIC*, 935 F. 2d. 83 (5th Cir. 1991) [*sic*] where the court held that the D'Oench-Duhme

doctrine could preclude assertion of a homestead claim. Defendants also argue that plaintiffs are estopped from asserting their homestead claim because at the time that plaintiffs executed the affidavit of Non-Homestead, they were not occupying the residence in question.

The court finds that on both of their arguments, the defendants are correct. Under Texas law, someone who represents that certain property is not his homestead and he [*sic*] is not occupying the property when the representation is made, is estopped from later making a homestead claim as to that property. As part of its motion for partial summary judgment, the FDIC submitted the affidavit of C.C. Prudhomme III, an employee of Bank One, Texas, formerly known as Deposit Insurance Bridge Bank. Attached to this affidavit are five exhibits (A-E) which are copies of five documents that plaintiff Ronald E. Chamness executed on four different dates. In each of these documents, Chamness represents that the property in question is not his homestead. Exhibit B is a Non-Homestead Affidavit executed by Chamness on June 3, 1981. In it Chamness states, under oath, that "He does not now reside upon" the property in question. Exhibit D is an affidavit executed by Chamness on June, [*sic*] 21, 1983. In this affidavit Chamness states, under oath, that he purchased the property in question in May, 1979, and began extensive renovation work on it in June, 1979. In paragraph three of that affidavit, Chamness states that the property "was not ready for occupancy until August 20, 1991, and was not occupied." This summary judgment evidence has not been controverted, and was accepted by Judge Porter as undisputed in his Memorandum Opinion and Order of

August 24, 1990. The Homestead Affidavit dated June 11, 1980, and the Non-Homestead Affidavit dated June 3, 1981, were executed by Chamness when he was not residing in the property in question. The plaintiffs are, there-fore, estopped as a matter of law from asserting their homestead claim. *Patterson*, supra., [*sic*] and cases cited therein.

Additionally, in *Buchanan*, supra., [*sic*] the court stated that in determining whether D'Oench applied to bar a party's claim, the applicable test was whether the party "lent himself to a scheme or arrangement whereby the banking authority on which the FDIC relied in insuring the bank was or was likely to be misled." Under that test, the court looks at the "relative culpability of the party making the claim." *Buchanan*, supra., [*sic*] at 85. It is clear from the evidence recited above that the plaintiffs have lent themselves to a scheme to mislead the banking authorities, and are now precluded, under the D'Oench-Duhme doctrine, from asserting their homestead claim against the defendants.

Plaintiffs also seek reconsideration of Judge Porter's decision to dismiss all of plaintiffs' claims as an imposition of sanctions. The Fifth Circuit has stated that dismissal of a case as a sanction will be upheld where there is a showing of "a clear record of delay or contumacious conduct by the plaintiff and when lesser sanctions would not serve the best interests of justice." *Sturgeon v. Airborne Freight Corp.*, 778 F.2d 1154 (5th Cir. 1985). In summary, the record in this case reveals that plaintiffs have failed to produce documents in response to two Requests for Production of Documents filed by the FDIC. In particular, the record with respect to the First Request for Production is illuminating with respect

to plaintiffs' conduct in this case. That request was filed on September 13, 1989. On October 26, 1989, the FDIC filed a Motion to Compel. Various negotiations ensued between the parties and the motion to compel was not heard. Plaintiffs' counsel was allowed to withdraw by Magistrate Judge Tolle by order dated December 20, 1989, but Judge Tolle informed the parties that his order did not "extend the dates upon which responses to outstanding discovery requests must be made." Nevertheless, the documents were not produced, and on February 21, 1990, the FDIC sent Chamness a letter requesting that he produce the documents requested. On March 2, 1990, the FDIC filed its second Motion to Compel. On March 12, 1990, after a hearing, Judge Tolle ordered plaintiffs to produce the documents by March 30, 1990. At the hearing, Judge Tolle told Chamness personally that no more extensions of time would be forthcoming. On March 27, 1990, plaintiffs filed another motion for extension of time seeking more time to file a response to defendants [*sic*] motion for partial summary judgment and to extend the discovery and scheduling deadlines. This was plaintiffs' seventh motion for extensions of time. After a hearing on April 2, 1990, the motion was denied by Judge Tolle. In his order denying plaintiffs' request for more time, Judge Tolle stated, "Plaintiffs have shown nothing which would justify further delay in this case. Plaintiffs have repeatedly asked for extensions of time to file required responses and to extend scheduling deadlines, and this Court has repeatedly granted those requests. At a hearing on March 12, 1990, the undersigned magistrate once again granted Plaintiffs' request for extension of time, but advised Plaintiff Chamness personally that no further

extensions of time would be forthcoming." Judge Tolle's order of March 12, 1990, ordering production of the documents by March 30, 1990, was not complied with, and on April 9, and May 18, 1990, the FDIC sent letters to plaintiffs requesting production of the documents. As of the date of Judge Porter's Order of August 24, 1990, plaintiffs had still not complied with Judge Tolle's order.

The record also shows that plaintiffs had not complied with Judge Tolle's order of March 12, 1990, that documents be produced by March 30, 1990, pursuant to the FDIC's Second Request for Production of Documents filed on December 8, 1989. Additionally, plaintiffs failed to comply with Requests for Admissions, and Interrogatories were answered nine days late and were not answered under oath.

By order dated October 4, 1989, Judge Porter required the parties to submit a joint Pre-Trial Order by June 22, 1990. By motion of March 27, 1990, plaintiffs sought to have that deadline extended. The motion was denied by Judge Tolle in his order of April 2, 1990, but plaintiffs failed to participate in the preparation and submission of a joint Pre-Trial Order.

Plaintiff also failed to file any response to the defendants' motions for summary judgment, even though the time for filing responses was extended twice.

Finally, in his Memorandum Opinion and Order of August 24, 1990, Judge Porter noted that plaintiffs had not filed responses to two motions for sanctions filed by the FDIC in June, 1990, nor to two motions for sanctions filed by defendant Wikert also in June, 1990. These motions for sanctions were the basis for

the dismissal of plaintiffs' claims by Judge Porter. In their July 28, 1992, Motion to Reconsider, plaintiffs, for the first time, challenge the motions for sanctions filed by the defendants. This is over three years after the motions were filed by defendants and almost three years since Judge Porter entered his Memorandum Opinion and Order.

Judge Porter found that plaintiffs had "repeatedly engaged in willful and bad faith conduct" with respect to meeting deadlines and court orders and with respect to discovery. After a review of the record, this court agrees with those findings and with the finding that dismissal of Plaintiffs' claims was the appropriate sanction.

Plaintiffs' Motions to Dismiss

Plaintiffs' Ronald E. Chamness and Rhea Ann Chamness seek dismissal of their claims against defendants FDIC, Oregon, Inc., and William Trione. Plaintiffs Ronald E. Chamness, Jr., Lisa C. Chamness, and Holly A. Chamness move to dismiss all of their claims as to all defendants. Rule 41(a)(1), Fed. Rules Civ. Proc., allows a plaintiff to dismiss claims prior to service of an answer or of a motion for summary judgment. In this case, the defendants had both answered and filed motions for summary judgment. Rule 41(a)(2) allows dismissal of a suit by plaintiffs only "upon order of the court and upon such terms and conditions as the court deems proper."

Under the facts of this case, the court does not believe it would be proper to grant plaintiffs' motions to dismiss. The motions are untimely made, having been filed almost three years after the court had

ruled on the merits of this case and found against the Plaintiffs.

Accordingly, it is ORDERED that plaintiffs [*sic*] Motion to Reconsider and Vacate Memorandum Opinion is denied, as are all plaintiffs' motions to dismiss. Since the counterclaim by Bank One against Chamness is no longer in the case, and the issue of attorneys fees has been waived by the defendants, the court will enter final judgment for the defendants in accordance with this order and the Memorandum Opinion and Order of August 24, 1990.

SO ORDERED.

SIGNED this 29th day of April, 1993.

/s/ Jorge A. Solis

JORGE A. SOLIS
United States District Judge